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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOSEPH ASH,
Petitioner,

vs.

STERNWEST CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK S. GOTTLIEB, ESQ.
Counsel of Record

FEINBERG, GOTTLIEB & GROSSMAN

15760 Ventura Boulevard
Suite 1700
Encino, CA 91436
(818) 905-1600

Attorneys for Respondent
STERNWEST CORP.

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Suite 1700
Encino, CA 91436
(818) 905-1600

Attorneys for Respondent
STERNWEST CORP.

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QUESTIONS PRESENTED FOR REVIEW

The first, second and fourth questions presented for review by Petitioner, JOSEPH ASH, are not legally cognizable in his Petition for Writ of Certiorari. Those questions are addressed to a **1988** decision of the California Court of Appeal, therefore, the Petition based thereon is clearly untimely.

The third question appears timely because it is addressed to a **1991** decision of the California Court of Appeal, however, it presents no valid federal question. In his third question (which consists of three parts), Petitioner inquires whether the "law of the case" doctrine overrides federal due process and jurisdiction guarantees. For the reasons set forth below, the "law of the case" doctrine, which is merely an application of the principle of res judicata, is a rule of substantive law that cannot, by itself, violate due process. The application of the "law of the case" doctrine did not "override" federal due process or other constitutional guarantees. Thus, none of the questions for review presented by Petitioner support the issuance of a writ of certiorari.

OPINIONS AND ORDERS BELOW

Only Exhibits A, F and G annexed to the Petition are properly included therein. Those exhibits, which consist of (1) the California Court of Appeal decision (B042634) decided September 23, 1991, (2) the denial of the Petition for Rehearing on October 17, 1991 and (3) the California Supreme Court denial of review (S023658) are the only matters that can be addressed in a timely manner by the Petition.

Exhibits B, C and D are not timely or proper subjects of the Petition. Exhibit B is the July 18, 1990 decision of the United States Court of Appeals for the Ninth Circuit. Exhibit C is the July 3, 1986 decision of the California Court of Appeal in B017945. Exhibit D is the August 13, 1988 decision of the California Court of Appeal in B027482. Exhibit E is neither an opinion nor order of any court. Exhibit E consists of two declarations prepared by Petitioner and signed by two clerks of the Los Angeles Superior Court.

COUNTER-STATEMENT OF THE CASE

The statement of the case in the Petition not only contains a number of inaccuracies, but it deliberately confuses several appellate decisions for the purpose of including the time-barred appeals in this Petition. The key to this case is to understand the distinction between the **1988** and **1991** decisions of the California Court of Appeal. In actuality, this Petition is directed against the 1988 appeal, however, because that appeal is no longer reviewable, Petitioner ostensibly addresses the 1991 appeal, even though no federal questions are presented by that appeal.

The 1988 decision by the California Court of Appeal on August 13, 1988 (B027482) (hereinafter sometimes referred to as the "1988 appeal") was based upon Petitioner's appeal from a 1987 order of the Los Angeles Superior Court in which Petitioner was awarded attorney's fees, enhancements and interest. In spite of the enhancements and the inclusion of interest for the prior two years, Petitioner remained dissatisfied. Accordingly, in 1987 he filed appeal number B027482 in which he sought

additional enhancements and pre-judgment interest on the award of attorney's fees. On August 18, 1988, the California Court of Appeal, by Justice Ronald George (now sitting on the California Supreme Court), denied Petitioner's appeal (Exhibit D to the Petition).

In his Opening Brief in the 1988 appeal, Petitioner requested attorney's fees on appeal -- whether or not he prevailed. His reasoning was that because he was the prevailing party in the trial court in 1985, any subsequent proceeding in the trial court or in the court of appeal gave Petitioner an automatic entitlement to new awards of attorney's fees without regard to success. In its Respondent's Brief, Respondent herein opposed Petitioner's request for attorney's fees if he lost the appeal; and, Respondent requested that it be awarded reasonable attorney's fees if it prevailed on that appeal, which it did.

In his Reply Brief in the 1988 appeal, Petitioner herein expressly argued against Respondent's request for attorney's fees on appeal. In its decision in B027482, the California Court of Appeal denied Petitioner's appeal and awarded costs, including reasonable

attorney's fees, to Respondent, the amount of which costs and fees was to be determined by the trial court upon remand.

Contrary to the repeated characterizations in his Petition, Petitioner not only had an opportunity to litigate and argue against Respondent's request for attorney's fees on appeal, **but he actually did so**. Nevertheless, Petitioner immediately filed a petition for rehearing on a number of grounds, including the ground that the Court did not give Petitioner an opportunity to brief or otherwise litigate the award to Respondent of attorney's fees. The Court of Appeal rejected Petitioner's false characterization and denied rehearing. To date, Petitioner has initiated approximately 18 separate unsuccessful challenges against the 1988 appeal decision on the identical grounds set for in the aforesaid petition for rehearing.

Clearly, this pending Petition cannot review the 1988 appeal. In order to overcome this jurisdictional bar, Petitioner seeks to have this Court go back more than three years under the guise of his more recent unsuccessful

appeal. Specifically, on March 20, 1989, the Los Angeles Superior Court granted Respondent's motion for attorney's fees on appeal (pursuant to the direction of the Court of Appeal in August, 1988). Petitioner filed an appeal (B042634) from that order, which appeal was denied on September 3, 1991 (hereinafter sometimes referred to as the "1991 appeal"). Petitioner's petition for rehearing was denied on October 17, 1991 (Exhibit F to the Petition) and his petition for review to the California Supreme Court was denied on December 18, 1991 (Exhibit G to the Petition).

The only issue in the 1991 appeal is whether the trial court abused its discretion as to the **amount** of the award of attorney's fees on appeal to Respondent. Nevertheless, the thrust of Petitioner's 1991 appeal was addressed to the issue of Respondent's **entitlement** to the award. Simply stated, Petitioner contended that the trial court erred in following the instructions of the Court of Appeal and the "law of the case" doctrine. As indicated in the 1991 appeal decision (Exhibit A to the Petition), the Court rejected Petitioner's argument against Respondent's entitlement to the award on the ground that the issue was

already fully decided and that there were no applicable exceptions to the "law of the case" doctrine.

Notwithstanding Petitioner's extreme persistence, every court, including the United State District, Central District of California and the Ninth Circuit Court of Appeals, has found no merit to the numerous challenges. Although all of Petitioner's attacks are based upon the claim that he was not given an opportunity to litigate the issue of attorney's fees on appeal in 1988, this position is absolutely without any factual support. Accordingly, Petitioner was not denied due process.

SUMMARY OF THE ARGUMENTS

The Petition is fatally defective for a number of procedural and substantive reasons. It is difficult to briefly summarize the improprieties because they are so wide-ranging. Accordingly, these opposition papers are organized in three general areas.

First, the Petition is untimely. Although the Petition was served on the ninetieth day after summary denial of review by the California Supreme Court of the 1991 appeal, it was filed more than three years after the

1988 denial of review by the California Supreme Court of Petitioner's unsuccessful 1988 appeal. Even the most cursory review of the Petition reveals that it is, in reality, only directed against the time-barred 1988 appeal. (The Petition is also untimely in its attempt to seek review of the 1990 decision by the Ninth Circuit Court of Appeals.)

Second, the Petition is frivolous, fictitious and raises no federal questions. The only issue in the 1991 appeal is whether the trial court erred in awarding Respondent approximately $20,000.00 in costs, including attorney's fees, on appeal. On the issue of **entitlement**, the trial court was merely following the instructions of the 1988 appeal decision. In the 1991 appeal, the Court determined that the lower court correctly followed the law of the case. This raises no federal question. As to the **amount** of the award, the standard of review under California law is the abuse of discretion standard. No federal question is raised here, either.

As for the 1988 appeal, even if this Petition were timely, it presents no viable federal question. As explained below, although Petitioner argues that he was not

given an opportunity to litigate the issue of the award of attorney's fees on appeal to Respondent, that claim is utterly false. Indeed, the entire Petition is based upon that factually incorrect premise. The 1988 appeal decision was not the result of a refusal by that Court to permit Petitioner an opportunity to litigate the issue of an award of attorney's fees to Respondent. Petitioner actually raised the issue of attorney's fees on appeal in his Opening Brief and opposed Respondent's request in his Reply Brief in that appeal. The claim of denial of due process is utterly groundless.

Third, Petitioner's substantive legal arguments are without merit. Adherence to the "law of the case" doctrine is not a deprivation of due process. Furthermore, the California Court of Appeal did not make a void order that was beyond its jurisdiction as argued by Petitioner. Indeed, it was Petitioner himself that invoked the jurisdiction of the California Court of Appeal and raised the very issues that were adjudicated. Therefore, even if the Petition were timely and raised a threshold federal question, the substantive law relied upon by Petitioner is inapplicable.

ARGUMENTS

I.

THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY.

28 U.S.C., Section 2101(c) requires that a "writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree". United States Supreme Court Rule 13.1 specifies that a petition for writ of certiorari to review a judgment from a state court of last resort must be filed within ninety days after entry of judgment or within ninety days after entry of the order denying discretionary review. These requirements are mandatory and jurisdictional. Missouri v. Jenkins, (1990) ___ U.S. ___, 109 L.Ed. 2d 31, 110 S.Ct. 1651.

On the surface, the Petition on file herein appears timely. It was served ninety (90) days after the December 18, 1991 denial of the petition for review to the California Supreme Court from the 1991 appeal. Nevertheless, the Petition is untimely because its substance

is directed against the 1988 appeal decision.

In fact, Petitioner has already sought *federal* review of the 1988 appeal decision on the exact same grounds raised in his Petition. On March 1, 1989, Petitioner filed a civil rights action in the United States District Court, Central District of California (CV89-00367-RG) against Respondent herein and the Los Angeles Superior Court and the California Court of Appeal. The federal action was dismissed on April 10, 1989 on the ground that the District Court lacked subject matter jurisdiction over a decision by a state appellate court. On July 18, 1990, the Ninth Circuit Court of Appeal affirmed the judgment of dismissal on the ground that only the Supreme Court had jurisdiction over the state court appellate decision pursuant to 28 U.S.C., Section 1257.

By virtue of his erroneous decision to seek relief in the United States District Court, Petitioner failed to file a timely petition for writ of certiorari in this Court from the 1988 appeal. Accordingly, Petitioner is improperly attempting to obtain review of the 1988 appeal under the guise of the 1991 appeal. As discussed elsewhere

in these papers, there were only two issues in the 1991 appeal: (1) whether the trial court erred in awarding attorney's fees on appeal to Respondent pursuant to the express instructions of the Court of Appeal and (2) whether the trial court abused its discretion as to the amount of such award. Because these issues do not present a federal question, it is clear that the alleged federal questions posed in the Petition are directed solely at the 1988 appeal; therefore, the Petition is untimely.

II.

THE PETITION IS FICTITIOUS, FRIVOLOUS AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

It is axiomatic that the United States Supreme Court will not entertain a petition for writ of certiorari that is fictitious, frivolous or presents an insubstantial federal question. Duncan v. Tennessee, 1972) 405 U.S. 127, 31 L.Ed. 2d 86, 92 S.Ct. 785. Indeed, where the purported constitutional objections raised by the petitioner are insubstantial, the Supreme Court is without jurisdiction to review a judgment of the state court. Wick v.

Chelan Electric Co., (1929) 280 U.S. 108, 74 L.Ed. 212, 50 S.Ct. 41. The due process clause of the Fourteenth Amendment does not take up the laws of the states and make all questions pertaining to them constitutional questions thereby enabling the Supreme Court to review state court decisions upon questions of state law. Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., (1917) 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318.

Although 28 U.S.C., Section 1257(a) permits the Supreme Court to review state court appellate decisions by writ of certiorari, the petition must be based, at a minimum, upon a substantial federal question. In the case at bar, no federal question whatsoever is presented in connection with the 1991 appeal. As stated above, the only two issues in that appeal were whether the trial court erred in following the instructions of the Court of Appeal and whether the trial court abused its discretion as to the amount of the attorney's fees on appeal that were awarded.

Petitioner attempts to fashion a federal question out of the foregoing issues by arguing that the appellate court's reliance on the "law of the case" doctrine

amounted to a denial of due process. This contention is absurd. The "law of the case" doctrine, like the principles of res judicata and collateral estoppel, is merely a substantive rule of law that compels one court to refrain from re-adjudicating issues that were previously fully tried. By virtue of Petitioner's super-human persistence in prolonging this case for more than twelve years, the courts have properly applied the "law of the case" doctrine. In so doing, Petitioner has in no way been deprived of due process or any other constitutional right. Indeed, in view of the fact that this Petition represents his eighteenth challenge to the 1988 appeal decision, the courts have demonstrated great patience and indulgence.

Even if Petitioner were permitted to resurrect the 1988 appeal, there is no factual or legal basis for any federal question. The Court of Appeal did not make any void orders or exceed its jurisdiction by awarding attorney's fees on appeal to Respondent. The Court acted well within its jurisdiction on the issues of attorney's fees and interest because those issues were, in fact, placed in controversy by Petitioner himself. When

Petitioner requested attorney's fees on appeal, Respondent herein argued against that request and made its own request for attorney's fees if it prevailed. Petitioner not only had a full and fair opportunity to oppose Respondent's request, but he did so in his Reply brief. Accordingly, no constitutional issue or federal question, exists in the context of either the 1988 or 1991 appeal decisions.

III.

THE PETITION IS WITHOUT MERIT AS A MATTER OF BOTH FEDERAL AND STATE LAW.

Petitioner begins his legal arguments with the statement that he has been denied any forum for the redress of grievances. Petitioner argues that the Court of Appeal went beyond its jurisdiction and committed its "own original torts", thereby resulting in a conflict between "federal Constitutional due process and State law". These serious-sounding charges are completely without factual or legal support.

As for the 1991 appeal, the affirmance of the trial court's award of $19,952.25 to Respondent herein was proper under both federal and state law. From the

procedural due process view-point, Petitioner had a full and fair opportunity to present his arguments on appeal. He filed a lengthy Opening Brief and a lengthy Reply Brief. The mere fact that he lost does not mean that the Court refused to entertain or consider his arguments.

With respect to the substantive law in the 1991 appeal, the Court reached the right conclusions for the right reasons. In applying the "law of the case" doctrine, the Court followed the recent decision from the same appellate district entitled Benson v. Greitzer, (1990) 220 Cal.App.3d 11, 269 Cal.Rptr. 201, in which the Court ruled that the "law of the case" doctrine compelled the trial court to award attorney's fees on appeal pursuant to the instructions of the higher court on an earlier appeal. As for the amount of the award, Petitioner did not overcome the presumption of correctness of a discretionary ruling of the trial court. Thus, even if these issues involve federal questions (which they do not), they were decided correctly.

Even if this Court undertook to review the 1988 appeal, it would find no federal questions and no legal errors. As for the award of attorney's fees on appeal

to Respondent as the prevailing party, there is ample authority in California for the proposition that the prevailing party on appeal is entitled to an award of attorney's fees. For example, see Montgomery v. Bio-Med Specialties, Inc., (1986) 183 Cal.App.3d 1292, 1296, 228 Cal.Rptr. 709. The cases cited by Petitioner (at Footnote 1, Page 11 of the Petition) are not applicable. Those authorities hold that the prevailing party on appeal from an *interlocutory* order is not entitled to an award of attorney's fees on appeal. In the underlying action, the appeal was from a *post-judgment* order, therefore, the award was proper under applicable statutory and decisional law.

The other issue in the 1988 appeal involved Petitioner's request for interest on the award of attorney's fees. The Court rejected his request on the ground that there was no authority for imposing interest from the date that legal services were rendered and on the ground that it was contrary to the law of the case from the earlier appellate decision rendered on July 3, 1986 in appeal number B017945 (Exhibit C to the Petition). Although the Court modified *sua sponte* the interest rate imposed by the

trial court, it was well within its power to do so because the interest rate issue was specifically placed in controversy by Petitioner in his Opening Brief wherein he requested that the interest rate be modified upward from ten percent (10%) to eighteen percent (18%) per annum.

Even if any part of the 1988 appeal decision were improper, at the very most it was a mere error at law. Petitioner's obvious dissatisfaction with the 1988 appeal does not translate into a denial of due process or any other federal law. In his 18 challenges over the course of more than three years, Petitioner has cited the same inapplicable cases for the same erroneous factual and legal propositions. To date, every court has considered, then rejected Petitioner's interpretations of both the facts and the law. The 1988 appeal decision was not a void order or beyond the jurisdiction of the court. On the issue of Petitioner's claim that the order is void, the courts have consistently followed the clear holding of Wells Fargo & Co. v. City of San Francisco, (1944) 25 Cal.2d 37, 152 P.2d 625 [holding that an erroneous award of costs is not beyond the jurisdiction of the court and is not a void order], rather than

Petitioner's strained interpretation of Jones v. World Life Research Institute, (1976) 60 Cal.App.3d 836, 131 Cal.Rptr. 674 (cited at Page 12 of the Petition).

In addition to the foregoing, Respondent is compelled to briefly address Petitioner's arguments regarding his unsuccessful foray into the United States District Court and Ninth Circuit Court of Appeals. At Pages 24 through 32 of the Petition, Petitioner mounts a direct challenge to the decision of the Ninth Circuit Court of Appeal in case number 89-55380, filed July 18, 1990 (Exhibit B to the Petition). The thrust of Petitioner's argument is that he should have been permitted to obtain injunctive relief in the federal trial court against the 1988 appeal decision. As indicated in the decision of the Ninth Circuit Court of Appeal, the United States District Court did not have jurisdiction over Petitioner's claim. Under 28 U.S.C., Section 1257(a), only this Court has jurisdiction to review the final decision of the highest court of a State. Nevertheless, even if the United States District Court and the Ninth Circuit Court of Appeal were wrong, Petitioner's pending challenge is clearly untimely. Nevertheless, even

if the Petition constituted a timely appeal or petition, it is substantively without merit. The cases cited by Petitioner, such as Miofsky v. Superior Court of California, (9th Cir. 1982) 703 F.2d 332 were expressly disapproved in World Wide Church of God v. McNair, (9th Cir. 1986) 805 F.2d 888 [citing District of Columbia Court of Appeals v. Feldman, (1983) 460 U.S. 462, 103 S.Ct. 1303].

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be summarily denied. Petitioner and his attorneys have managed to prolong this case for more than twelve years, seven of which have been devoted exclusively to his quest of post-judgment attorney's fees. Petitioner has filed seven direct appeals and a multitude of petitions in the original action, as well as, the aforesaid federal court action and a separate state court malicious prosecution action (which has been

dismissed and affirmed on appeal). For the reasons set forth above, this Court must deny the Petition and put an end to this ongoing frivolous litigation.

Dated: April 9, 1992

Respectfully submitted,

FEINBERG, GOTTLIEB & GROSSMAN

By: Mark S. Gottlieb
MARK S. GOTTLIEB, ESQ.
Attorneys for Respondent
Sternwest Corporation

j:\i-stern\ash-supr.owc